LIBRARY
SUPREME COURT, U. S.
AUG 7 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 385

ELMER G. PAXTON,
Petitioner,

vs.

THE STATE OF KANSAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

ELWAINE F. POMEROY
Garlinghouse Building
Topeka, Kansas

RAYMOND L. SPRING
2541 Seabrook
Topeka, Kansas

DALE H. CORLEY
LELYN J. BRAUN
114 West Pine
Garden City, Kansas

Counsel for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	4
Statement	4
Reasons for Granting the Writ	10
Conclusion	15
Appendix A—Statutes	A1
B—Opinions Below	A2
C—Extracts of Record	A22

Citations

CASES:

Bass v. *Mississippi*, 381 F. 2d 692	14
Beck v. *Washington*, 369 U.S. 541, 8 L. Ed. 2d 98, 82 S. Ct. 955	10
Estes v. *Texas*, 381 U.S. 532, 14 L. Ed. 2d 543, 85 S. Ct. 1628	10
Fay v. *New York*, 332 U.S. 261, 91 L. Ed. 2043, 67 S. Ct. 1613	13
Griffin v. *California*, 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229	12
Hoyt v. *Florida*, 368 U.S. 57, 7 L. Ed. 2d 118, 82 S. Ct. 159	13
Irvin v. *Dowd*, 366 U.S. 717, 6 L. Ed. 2d 751, 81 S. Ct. 1639	10, 13
Rideau v. *Louisiana*, 373 U.S. 723, 10 L. Ed. 2d 663, 83 S. Ct. 1417	10
Sheppard v. *Maxwell*, 384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507	10, 11, 12
State v. *Hall*, 187 So. 2d 861	14

Strauder v. *West Virginia*, 100 U.S. 303, 25 L. Ed. 664 13
White v. *Crook*, 251 F. Supp. 401 14
Williams v. *South Carolina*, 237 F. Supp. 360 14

STATUTES:

KSA 21-551 4
KSA 43-116 ..... 4, 14
KSA 43-117 ..... 4, 14

MISCELLANEOUS:

American Bar Association Project on Minimum Standards for Criminal Justice: *Standards Relating to Trial by Jury* 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. .....

ELMER G. PAXTON,
Petitioner,

vs.

THE STATE OF KANSAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Kansas, entered in the above entitled case on May 11, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Kansas (R. 143), printed in Appendix B hereto, is reported in 201 Kan. 353, 440 P.2d 650. The opinion of the Supreme Court of the State of Kansas on rehearing (R. 154), printed in Appendix B hereto, is unreported at this date.

JURISDICTION

The judgment of the Supreme Court of the State of Kansas was entered on May 11, 1968. R. 143, p. A2, *infra*. Rehearing was denied on June 19, 1968. R. 154, p. A20, *infra*. The jurisdiction of this court is invoked under 28 U.S.C. §1257 (3) [since rights, privileges and immunities under the Constitution are claimed to have been infringed].

QUESTIONS PRESENTED

1. Whether fair trial by jury and due process of law are denied, in violation of the 6th and 14th Amendments to the Constitution, where in a criminal case:

a) after motion for change of venue is overruled, the examination of jurors on voir dire indicates that discussion of the case prejudicial to the accused has pervaded the community, and all or nearly all jurors called have heard or participated in such discussion;

b) in a community having only 1200 qualified potential jurors including women, there exists systematic exclusion of women from jury service, thus reducing substantially the number of available persons for jury service and resulting in a jury that is at best a cross section of the male population of the community only;

c) the trial judge, intervening in voir dire examination of jurors, incorrectly instructs a juror on the burden of proof and presumption of innocence, although correct instructions in this regard are given at the conclusion of the trial without reference to the earlier incorrect comments;

d) the trial judge states in the presence of the jury that the evidence in the case will be basically the same as that in a prior case in which a conviction resulted in the same county;

e) in overruling a challenge for cause directed at a juror who five times indicated on voir dire that the failure of a defendant to testify might influence his verdict;

f) in requiring a defendant to show affirmatively that he is prejudiced in being required to utilize peremptory challenges allowed by law to remove persons against whom challenges for cause were erroneously overruled;

g) subsequent to the trial it appears that a member of the trial jury is related to a person in the community who was the victim of an offense similar to the one allegedly committed by the defendant, and involving persons allegedly associated with defendant in the crime charged, and a motion for new trial predicated in part thereon having been overruled;

h) the trial court refuses to grant a mistrial following irrelevant comments by state's witnesses and state's attorney disclosing offenses by state's witnesses unrelated to the accused, but tending to prejudice the accused in the eyes of the jury by virtue of his association with such state's witnesses;

i) the trial court states in the presence of the jury that neither the court reporter, county attorney nor the court could understand testimony of a key witness for the defense.

2. Whether due process of law is denied in allowing a conviction to stand where evidence of a conspiracy which was necessary to proof of the offense charged was circumstantial at best, when in fact certain state's witnesses, who were necessarily parties to such alleged conspiracy, did not

testify to the existence of any conspiracy or agreement, in spite of the fact that such witnesses could claim no privilege in respect thereto, since they were not charged with this offense and could not have been so charged, the statute of limitations having expired.

3. Whether due process of law is denied where the State Supreme Court considers an affidavit of a juror, filed during the pendency of the appeal and without opportunity for cross-examination by the accused, having a bearing on the juror's knowledge of the circumstances of an offense similar to the offense in question.

4. Whether the evidence was so totally insufficient to support a conviction as to deny petitioner due process of law.

STATUTES INVOLVED

Section 21-551, Kansas Statutes Annotated, is the Statute under which Petitioner was prosecuted. Sections 43-116 and 43-117, Kansas Statutes Annotated, are involved in the question presented herein relating to exclusion of women from the panel of jurors. All statutes are set out in Appendix A hereto.

STATEMENT

In April, 1967, Petitioner was tried and convicted in the District Court of Lane County, Kansas, of obtaining money by false pretenses (K.S.A. 21-551) from one C. W. Monroe at Dighton, Kansas, on December 12, 1962. This was the second trial of petitioner, the first having resulted in a mistrial for failure of the jury to agree three months earlier. Some time prior to that trial, one Richard Barker

had been tried and convicted in the same Court on a like charge arising out of the same transaction.

The trial was in Dighton, in Lane County, Kansas; Lane County has a total population of 3077 persons and of this number about 1200, including women, were eligible jurors (R. 6, Appendix C, A22, A23). Women were not included in the box from which prospective jurors names were drawn (R. 6, Appendix C, A23). Petitioner challenged the array for exclusion of women jurors (R. 6, Appendix C, A24). The challenge was overruled, the trial court finding that the exclusion resulted from the fact that women were customarily not asked whether they desired to serve (R. 7, Appendix C, A25).

Petitioner moved for change of venue, alleging that because of the size of the community and the common knowledge of the matter in question in the community, a fair and impartial jury could not be selected in Lane County (R. 3). This motion was overruled.

A total of forty-three jurors were called for examination on voir dire. Several were excused for having an opinion in the case, others as relatives of the complaining witness and as relatives or employees of the sheriff, county attorney or a state's witness, and some upon indication that they could not be fair to petitioner if he did not testify. Others who were not excused indicated that they had heard and participated in discussion of the case in the community (R. 8-26). The general character of the discussion in the community was demonstrated by comments made by various jurors during voir dire, such as: "I don't like to see people swindled" (R. 23), "I would have to hear what the other side said about it" (R. 17), "They just told me how they got the job done" (R. 20), and that Sheriff Marsteller had given one juror "a pretty good rundown on what he thought the results should be" (R. 13). Juror Albert

Ehmke five times indicated that the fact a defendant did not testify might prejudice him toward the defendant: "It might make a difference" (R. 11, Appendix C, A26), "I think the evidence would have to show at least why he didn't take the stand." (R. 11, Appendix C, A26), "this has always been a sore point with me." (R. 11, Appendix C, A27), "I can't see why an innocent man can't say so." (R. 11, Appendix C, A27), "I'm afraid it might" [leave some reservation] (R. 11, Appendix C, A27). Petitioner's challenge of Juror Ehmke for cause was overruled (R. 12, Appendix C, A27), and he served as a trial juror. Another member of the trial jury was related by affinity to the wife of the complaining witness, but unfortunately was not challenged. During voir dire, the trial court excused one juror who had been a juror on the earlier Barker case, making the comment in the presence of the jury that the evidence would be the same in the present case. On objection by petitioner, the court amended his statement by saying that the evidence would be similar, with the same complaining witness (R. 11, Appendix C, A26). At another point during voir dire, the court intervened to point out that petitioner would not be entitled to the presumption of innocence if the state established its case, and that petitioner would be required to put in evidence in that event (R. 15, Appendix C, A31). The court properly covered the presumption of innocence in his instructions to the jury at the conclusion of the trial, but made no reference at that time to the earlier comment during voir dire (R. 97).

The evidence developed that petitioner and his associates, two of whom testified as state's witnesses, sold Mr. C. W. Monroe a treatment of his house for wood rot. The state's theory of trial was that the house was not in need of such treatment and proper chemicals to provide such treatment were not used, and that petitioner's repre-

sentations to Mr. Monroe that a proper treatment had been provided constituted the crime of false pretenses. The only evidence as to the presence or absence of wood rot or proper chemicals in the treatment at the time of the alleged offense, was that of a state's witness who testified that they were carrying proper chemicals with them (R. 48, 50), and the testimony of the complaining witness that one of petitioner's associates (Barker) went under the house and returned with what he said was a sample of the wood rot present (R. 27), this statement being made in the presence of petitioner. Complaining witness testified that he could smell diesel fuel and "something else" while the house was being sprayed (R. 29) and it was established that a proper treatment would be 5% pentachlorophenol (which has a very pungent odor) in a diesel fuel base (R. 44, 48, 52, 58). Evidence given by expert witnesses for both the state and defense as to the presence of evidence of wood rot or proper chemicals, based on examinations of the house approximately two years or more after the alleged offense, was in conflict.

There was no evidence that petitioner had or claimed to have direct personal knowledge of the facts pertaining to the presence of wood rot or the use of proper chemicals for treatment. The evidence indicated that he did not personally inspect the underside of the house and was not present when the treatment was applied. No evidence was offered of any conspiracy or agreement to defraud involving petitioner, although two persons, Ulmer and Woodard, who would necessarily have been parties to any such conspiracy or agreement, testified as witnesses for the state. Neither Ulmer (R. 36) nor Woodard (R. 46) were ever charged with any offense arising out of this transaction, nor could they have been at the time of trial since the statute of limitations had expired. No evidence was offered to show that petitioner knew, or had reason to know,

that conditions were not as he represented them to be, if in fact they were not.

During the trial, the state developed the facts that Ulmer and Woodard had both been in the penitentiary (R. 29, 45, 68), queried whether Woodard's license as a termite exterminator had been terminated by the state (R. 43) and finally queried Woodard as to the circumstances which caused a termination of his relationship with petitioner (R. 44). Upon objection at this point by the defense (R. 44) the State's attorney stated in the presence of the jury that it was his purpose to present any continued dealings showing the same type of operation (R. 44, Appendix C, A35). At this point defense counsel moved a mistrial, which was denied (R. 44, Appendix C, A35). State's counsel then withdrew the line of questioning and the jury was instructed by the court to disregard anything with regard to any other dealings between Woodard and Appellant (R. 44, Appendix C, A35).

At the conclusion of the direct testimony of Dr. David Hart, an expert witness for the defense in the field of chemistry, the state requested a recess overnight so the testimony could be transcribed. The court denied this request and stated, in the presence of the jury, that there was no more chance that the reporter could read the scientific terms used by the witness than there was that the state's attorney or the court could understand them. (R. 92, Appendix C, A36).

The defense moved for discharge for failure to prove the crime charged, both at the conclusion of the state's evidence and of all the evidence, both times being denied (R. 80, 95). The jury found defendant guilty of the crime charged on April 28, 1967, and the trial court sentenced defendant to the penitentiary for not to exceed 5 years (R. 107).

On motion for new trial, petitioner urged, in addition to error based upon all objections heretofore mentioned, that newly discovered information disclosed that a juror, Albert Ehmke, was related to a resident of the community who was the victim of a crime similar to the one with which petitioner was charged, and involving one of petitioner's associates who was a witness for the state against petitioner (R. 103, 104). Motion for New Trial was overruled.

On appeal to the Supreme Court of the State of Kansas, all questions presented here as being denial of fair trial by jury were presented in essentially the same form, and the question of sufficiency of the evidence was raised (R. 109, 110). The state filed and included in its counter-abstract of the record an affidavit of juror Albert Ehmke disclaiming knowledge of the transaction referred to in the preceding paragraph herein (R. 141), and the Supreme Court considered and commented upon this affidavit in its opinion affirming the conviction (R. 147, Appendix B, A14). On motion for rehearing, petitioner urged denial of due process in this procedure, where petitioner had no opportunity to cross-examine affiant (R. 151). The Supreme Court denied rehearing, but struck the paragraph referring to the aforementioned affidavit, substituting another paragraph therefor (R. 155, Appendix B, A21).

The Supreme Court further held, in its opinion affirming petitioner's conviction, that where challenges for cause directed at jurors Jerel Barnett and Albert Ehmke were overruled, and where petitioner subsequently excused Barnett via peremptory challenge and offered no explanation for his failure to excuse Ehmke by the same means, petitioner was in no position to complain of the trial court's ruling on the challenges for cause (R. 146, Appendix B, A11).

On motion for rehearing, petitioner urged that such a position was inconsistent with the position taken by this court that the right to challenge certain jurors without showing cause cannot be abridged (R. 150). The Supreme Court did not comment on this issue in denying rehearing (R. 155, Appendix B, A21).

REASONS FOR GRANTING THE WRIT

1. The court below rejected application in this case of the principles of *Sheppard* v. *Maxwell*, 384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966), holding that any attempt to analogize the facts of this case to *Sheppard* was "unthinkable" since there was no showing of prejudicial newspaper, radio or TV coverage prior to or during the trial (R. 146, Appendix B, A9). Certainly it is true that the recent decisions in which this court has announced the principles by which fair trial rights of an accused must be guarded against the massed effect of prejudicial publicity have dealt with situations arising from a barrage of publicity through the mass media. *Sheppard* v. *Maxwell*, supra; *Estes* v. *Texas*, 381 U.S. 532, 14 L. Ed. 2d 543, 85 S. Ct. 1628 (1965); *Rideau* v. *Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963); *Beck* v. *Washington*, 369 U.S. 541, 8 L. Ed. 2d 98, 82 S. Ct. 955 (1962); *Irvin* v. *Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). It can hardly be gainsaid, however, that the tap roots of these cases lie deep in the principle that a fair trial cannot be had where there exists a reasonable likelihood that the verdict of a jury will be affected by prejudice arising from community sentiment. Yet the decision below indicates a dangerous tendency to limit the scope of these decisions by looking to cause, rather than effect; to apply *Sheppard* and its predecessors *only* where media coverage is involved.

Thousands of criminal trials occur annually in the small communities of this nation—communities just such as Dighton, Kansas. Most such trials are of insufficient statewide or regional concern to attract the attention of the daily newspapers and broadcasting media, located in the distant cities. Yet the record here demonstrates that in such cases sufficient local discussion may be, and is in fact, generated through the unrecorded medium of rampant rumor and hearsay in the corner coffee shop and across the back yard fence to result in the same effect at the jury level as that produced in the *causes celebre* by the mass media. *In no case can the simple expedient of change of venue be a more effective agent in securing the ends of justice.* The voir dire in this case provides a clear picture of the prevailing community sentiment before and during this trial, and this record provides an appropriate medium for this court to establish clearly that the principles of *Sheppard* apply not only on the highways, but in the byways of this nation as well.

2. In view of the pervasive community sentiment running against petitioner at the time of his trial, as demonstrated by the record, the action of the Supreme Court of Kansas in approving the actions of the trial judge during the trial would seem in direct conflict with the injunction of this court that under such circumstances "the trial courts must take strong measures to ensure that the balance is never weighed against the accused." *Sheppard v. Maxwell*, 384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966). The trial judge virtually opened the trial by advising the jurors that the evidence would be the same as that in an earlier case in which a conviction had occurred in the same community (R. 11, Appendix C, A26), immediately thereafter verbally twisted the arm of a juror who had five times stated that the failure of petitioner to

testify would affect his verdict, until the juror agreed that he would disregard that factor (R. 11, 12, Appendix C, A27) and, still on voir dire, incorrectly stated the law as to the presumption of innocence and burden of proof (R. 15, Appendix C, A31) leaving the jury, already aware of the sentiment of the community, with the understanding throughout the trial that petitioner would be expected to offer evidence of his innocence. During the trial, the court "cured" the conduct of the prosecutor in persisting in the attempted development of irrelevant facts tending to prejudice the jury against petitioner by refusing a requested mistrial and simply instructing the jury to disregard (R. 44, Appendix C, A35). As a final touch during the trial proper, the court commented in the presence of the jury that the testimony of a key defense witness, an expert in chemistry, was, in effect, incomprehensible (R. 92, Appendix C, A36), a comment referred to by the State Supreme Court as "injudicious in nature, but not prejudicial." (R. 147, Appendix B, A13). Finally, the trial court was apparently unimpressed by the fact that one of the trial jurors may have had knowledge of a similar previous incident involving a relative of the juror and one of petitioner's associates (R. 103, 104). This matter should have taken added importance from the fact that this was the very same juror, Albert Ehmke, who had on voir dire voiced over and over again his reservations against a defendant who did not take the witness stand.

Not only does the approval of these actions of the trial judge by the State Supreme Court conflict with the principles laid down by this court in *Sheppard*, it further, so far as the situation regarding juror Ehmke is concerned, runs head on against the rule forbidding comment on the silence of the accused. *Griffin* v. *California*, 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965). If comment by

the prosecution on the failure of an accused to testify is inherently prejudicial, how much greater the demonstrable prejudice where there sits on the jury a man who by his own admission is biased against the accused who does not testify. The opinion of the Supreme Court tends to gloss over this incident (R. 146, Appendix B, A10), but the record is clear (R. 11, 12, Appendix C, A26, A27) that this juror, having expressed his reservations in as many ways as he perhaps knew, finally gave in when pressed by the trial judge to a choice of saying he would follow the court's instructions or telling the court he would not do so. Perhaps no record presented to this court will offer a clearer opportunity for the court to consider the care which must be given in interrogation of jurors on *voir dire*, or to amplify what this court meant in stating that "no doubt each juror was sincere when he said that he would be fair . . ., but the psychological impact requiring such a declaration before one's fellows is often its father." *Irvin* v. *Dowd*, 366 U.S. 717, 6 L. Ed. 2d 751, 81 S. Ct. 1639 (1961).

3. Squarely presented by this record is the question whether due process of law and fair trial by jury are denied where women are excluded from the jury panel by a failure of local officials in carrying out their duties under the state law, thus rendering the jury less than a fair cross section of the community. This court has in the past considered the question of exclusion of women and has not held the constitution violated thereby. *Strauder* v. *West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1879); *Fay* v. *New York*, 332 U.S. 261, 91 L. Ed. 2043, 67 S. Ct. 1613 (1947); *Hoyt* v. *Florida*, 368 U.S. 57, 82 S. Ct. 159, 7 L. Ed. 2d 118 (1961). In *Hoyt*, however, the issue was not squarely presented, this court finding that the state was in fact making a reasonable attempt to include women on jury panels. In the past two years, lower courts have split on the issue

of total exclusion. In *White* v. *Crook*, 251 F. Supp. 401 (M. D. Ala. 1966), a federal district court held unconstitutional an Alabama statute excluding women from jury service. Another federal district court declined to do so with regard to a similar South Carolina statute. *Williams* v. *South Carolina*, 237 F. Supp. 360 (E.D.S.C. 1965). The United States Court of Appeals for the Fifth Circuit has agreed with *White*, expressing the view that the United States Supreme Court would now adopt the same view, *Bass* v. *Mississippi*, 381 F. 2d 692 (C.A. 5, 1967), and the Supreme Court of the State of Mississippi has expressly declined to follow *White*. *State* v. *Hall*, 1966 Miss. 187 So. 2d 861. The President of the United States has expressed concern with methods of jury selection which exclude any group from jury service. "It is not only the excluded group which suffers. Courts are denied the justice that flows from impartial juries selected from a cross section of the community." Message to Congress, April 28, 1966.

The record presented here would allow this court to approach this issue on narrow grounds. Women are not totally excluded from jury service in Kansas, but are exempt (KSA 43-116, Appendix A, A1). An affirmative statutory duty is, however, placed upon township and city assessors, requiring them, at the time of making the annual assessment of personal property, to inquire of each woman elector whether she desires to be exempt, listing for jury service those who do not claim the exemption (KSA 43-117, Appendix A, A1, A2). The record is clear in this case that the assessors in Lane County, Kansas, were not complying with this statutory duty (R. 6, Appendix C, A23, A24) and that this failure resulted from the method of taking personal property tax assessments (R. 7, Appendix C, A25). Methodology in the selection of jury panels, to secure juries representing a fair cross section of the com-

munity, is a matter of current concern in judicial administration, and the guidance of this court at this time would be most appropriate. See American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Trial by Jury*, May, 1968.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ELWAINE F. POMEROY
Garlinghouse Building
Topeka, Kansas

RAYMOND L. SPRING
2541 Seabrook
Topeka, Kansas

DALE H. CORLEY
LELYN J. BRAUN
114 West Pine
Garden City, Kansas

Counsel for Petitioner

APPENDIX A

Statutes Involved

KSA 21-551. **Cheating by false pretense, token statement or representation; penalties.** Every person who, with intent to cheat or defraud another, shall designedly by means of any false token or writing, or by means or by use of any trick or deception or false or fraudulent representation or statement or pretense * * * obtain from any person any money, personal property, right in action, or any other valuable thing or effects whatsoever, upon conviction thereof shall be punished in the same manner and to the same extent as for stealing the money, property or things so obtained.

KSA 43-116. **Exemption from jury service.** The following persons shall be exempt from serving as jurors, to wit: All persons holding office under the laws of the United States or this state, attorneys and counselors at law, women, physicians, all registered pharmacists and assistant pharmacists, ministers of the gospel, professors and teachers of colleges and other institutions of learning, ferrymen, all members of any company of firemen organized according to law, officers and attendants of the state industrial reformatory, and all persons more than sixty-five years of age: *Provided, however,* that this act shall not exempt from jury service township officers and officers of district schools.

KSA 43-117. **Same: women exempt, when.** That it shall be the duty of each township and city assessor, at the time of making the annual assessment of personal property, to inquire of each woman elector within his town-

ship or assessing district, whether she desires to be exempt from jury service for the ensuing year, and if she answers that she does desire to be so exempted from such jury service, her name shall not thereafter be placed in the list of persons to serve as jurors, nor otherwise selected for such purpose, but if she answers that she does not desire to be so exempted her name shall be reported by the assessor in making his regular report and the names of such suitable persons not wishing such exemption shall be placed in the lists as other qualified jurors are placed.

APPENDIX B

Opinions Below

No. 45,071

STATE OF KANSAS,
Appellee and Cross-Appellant,

v.

ELMER G. PAXTON,
Appellant and Cross-Appellee.

SYLLABUS BY THE COURT

1. A change of venue on account of prejudice against the accused by inhabitants of the county in which the case is pending should not be granted unless it is affirmatively made to appear that such prejudice exists as will be reasonably certain to prevent a fair trial.

2. A male accused cannot complain about the exclusion of women from the jury, in the absence of a showing of prejudice by reason thereof.

3. When an accused, knowing at the time of impanelling the jury that a juror is incompetent, fails to challenge for cause, he waives any right to make complaint upon that ground thereafter.

4. A verdict of guilty which has been approved by the trial court will not be set aside because of insufficiency of evidence, unless it is clearly made to appear that upon no hypothesis whatever is there substantial evidence to support the conclusion reached in the trial court.

5. To sustain a conviction of obtaining money by false pretenses, there must be evidence the accused had actual knowledge of the falsity of the representations made, or lacking such actual knowledge, intended to, and did, convey the impression he had actual knowledge that the representations were true and could be believed and acted on, thereby deceiving another to his injury.

6. A prior conviction by court-martial may not be used for the purpose of imposing an enhanced sentence under the habitual criminal statute (K.S.A. 21-107a).

7. In a criminal prosecution wherein the defendant was convicted of obtaining money by false pretenses (G.S. 1949 [now K.S.A.] 21-551), the record is examined, and as more fully explained in the opinion, it is *held*: (1) The trial court did not err in (a) denying defendant's application for change of venue; (b) overruling defendant's challenge to the array of jurors; (c) denying defendant's motion for new trial based on alleged trial errors; and (d) refusing to sentence the defendant as a second offender under the habitual criminal statute; and (2) the verdict is supported by substantial competent evidence.

Appeal from Lane district court; BERT J. VANCE, judge. Opinion filed May 11, 1968. Affirmed.

Raymond L. Spring, of Topeka, argued the cause, and *Dale H. Corley*, *Lelyn J. Braun* and *Patrick J. Regan*, of Garden City, and *Richard D. Greene*, of Denver, Colorado, were with him on the brief for the appellant and cross-appellee.

Daniel D. Metz, assistant attorney general, argued the cause, and *Robert C. Londerholm*, attorney general, and *John S. Elting*, county attorney, were with him on the brief for the appellee and cross-appellant.

The opinion of the court was delivered by

O'CONNOR, J.: This is an appeal by the defendant, Elmer G. Paxton, who was convicted by a jury of the crime of obtaining money by false pretenses, in violation of G.S. 1949 [now K.S.A.] 21-551. The basic questions presented by the defendant are: (1) alleged trial errors which he contends denied him a fair trial by an impartial jury; (2) the sufficiency of evidence to sustain the conviction. A third question, which is the basis of a cross-appeal by the state, is whether or not a prior court-martial conviction may be used to invoke the provisions of the habitual criminal act.

Early in December 1962, the defendant, R. V. Woodard and Richard Ulmer met at Woodard's home in Anthony, Kansas. Woodard had been in the termite control business for nearly twenty years. An agreement was reached to recheck the houses of Woodard's former customers for termites and ascertain if any other services could be rendered. It was further agreed that all checks received in payment for any services were to be made to Ulmer, who would cash the checks and receive twenty per cent thereof for his part in the operation. The balance, after payment of expenses, was to be divided equally between the defendant and Woodard. The purpose of Ulmer's acting

as the "check man" was that if any trouble developed, his fine could be paid by the other men, and thus, embarrassment to Woodard's company be avoided.

Thereafter, the three men, along with Richard Barker and two others, left Anthony, taking with them Woodard's car and truck. After stops in several towns and communities the group arrived at Dighton, Kansas, on December 12, 1962, where, at defendant's suggestion, they called on C. W. Monroe. Defendant knew Mr. Monroe to be an elderly person, having tried to sell him a termite job a year or so before. Also, Mr. Monroe had had his residence treated for termites by the Woodard company in 1960, with renewal contracts and annual inspections in 1961 and 1962. About 1:30 p.m. defendant and Barker went to the door and introduced themselves to Mr. Monroe as being with the Woodard company. The two men informed Mr. Monroe they were inspecting for termites and wood rot. Defendant went to one corner of the house and jumped up and down, the floor "gave a little," and Mr. Monroe was told it likely needed bracing. The men asked if they could inspect under the house. After receiving permission to do so, Barker made the inspection and returned with some decayed wood in his hand. Barker showed Mr. Monroe the wood and told him there was wood rot in the floor joists. Woodard was then called in from the car, and he showed Mr. Monroe some wood rot on a window casing of the house. Mr. Monroe was informed his house could be treated with a chemical called "penta" (pentachlorophenol) which would permanently take care of the wood rot. After Mr. Monroe agreed to the treatment, the men left. Shortly, two other men in a pickup truck arrived and sprayed fluid underneath the house for approximately forty-five minutes or an hour. Later in the afternoon the defendant returned to the Monroe home with Ulmer, whom

defendant introduced as the "chemical man" and the person handling the collections. Defendant did most of the talking. Mr. Monroe was told the treatment had been completed, that it was very expensive, and that 170 gallons of the chemical, at $6.80 per gallon, had been used. Mr. Monroe was directed to make a check for $1,156 to Ulmer. At defendant's request, Mr. Monroe called his bank and authorized payment of the check, whereupon the men left. Ulmer cashed the check that same afternoon, and the men gathered at a cafe in Dighton. In the ensuing conversation Barker expressed the thought that they could have obtained more money for the job, and defendant suggested they go back and attempt to get more money from Mr. Monroe. Woodard vetoed the idea. Twenty per cent of the money was paid to Ulmer, the expenses were paid, and the balance was divided between Woodard and the defendant.

Defendant's trial which resulted in his conviction took place in Lane county in April 1967. His first trial occurred three months previously and ended with a hung jury. Barker was tried and convicted in December 1964 in the same county for his part in the transaction.

We shall first direct our attention to numerous trial errors which defendant contends denied him a fair trial by an impartial jury. It should be mentioned that the points raised were set forth as grounds in defendant's motion for new trial which was denied by the trial court. We note the thrust of defendant's argument to be that when all of the alleged trial errors are considered together, the totality of circumstances surrounding the trial demonstrates a reasonable likelihood that the verdict of the jury was affected by prejudice, citing *Sheppard* v. *Maxwell*, 384 U.S. 333, 16 L.Ed.2d 600, 86 S.Ct. 1507, and *Estes* v. *Texas*, 381 U.S. 532, 14 L.Ed.2d 543, 85 S.Ct. 1628. Appellate coun-

sel has done a commendable job of weaving language from those cases into the factual situation here and thus presenting his client's cause in the most favorable light possible. Careful scrutiny, however, of each of the alleged trial errors, singly as well as collectively, will reveal that the taint of prejudice which would warrant reversal has not been made to appear.

Complaint is made that defendant's petition for change of venue, filed pursuant to K.S.A. 62-1318, was not acted on favorably by the trial court. In his petition the defendant alleged that it would be impossible to select a jury in Lane county that could fairly and impartially try the case because of the size of the county and the fact that persons other than the defendant had previously been tried in that county or entered pleas of guilty to the same charge upon which the present information was predicated, and further, that in defendant's first trial it was learned the citizens of the county had general knowledge of the offense and preconceived opinions as to defendant's guilt.

The only evidence offered by the defendant in support of his petition was the affidavit of his trial counsel, Lelyn J. Braun. In his affidavit Mr. Braun referred to the examination of prospective jurors in the first trial to the effect they had preconceived opinions about defendant's guilt, and then recounted what one or more of the jurors told him concerning their deliberations in the jury room. No counter affidavits were offered by the state. The trial judge, in denying the petition, observed that the attorney's affidavit was hearsay and otherwise improper, and further noted that in the previous trial twenty-four jurors had been qualified without difficulty from a panel of less than forty persons originally called. No complaint is now made about the court's refusal to consider Mr. Braun's affidavit.

When the petition for change of venue was presented to the district court, some reference was made to evidence submitted at the first trial where a similar petition had been presented and denied. None of that evidence, however, has been abstracted for our benefit.

We need devote little time to the principles of law governing an application for a change of venue in a criminal prosecution. Our cases quite generally hold that specific facts and circumstances showing prejudice must be proved to the satisfaction of the trial court (*State* v. *Eldridge,* 197 Kan. 694, 421 P.2d 170, cert. denied 389 U.S. 991, 19 L.Ed.2d 483, 88 S.Ct. 486, and cases cited therein), and when the trial court's ruling upon this question is supported by competent evidence, such ruling will not be disturbed (*State* v. *Hooper,* 140 Kan. 481, 37 P.2d 52; *State* v. *Miller,* 131 Kan. 36, 289 Pac. 483). Two of our most recent expressions on the subject where the matter was explored in considerable depth are *State* v. *Poulos,* 196 Kan. 253, 411 P.2d 694, cert. denied 385 U.S. 827, 17 L.Ed.2d 64, 87 S.Ct. 63, and *State* v. *Turner,* 193 Kan. 189, 392 P.2d 863.

The rule is well established that before a court is justified in sustaining an application for a change of venue on account of prejudice against the defendant by the inhabitants of the county in which the cause is pending, it must affirmatively appear that such prejudice exists as will be reasonably certain to prevent a fair trial. (*State* v. *Turner,* supra.)

Upon the record before us, we have no difficulty in concluding that defendant failed to present affirmative evidence that such prejudice existed as to make it reasonably certain he could not obtain a fair trial, and consequently, the trial court's ruling will not be disturbed. Moreover, a study of the proceedings leading up to the selection of the

jury demonstrates that a trial could be had by a fair and impartial jury.

The population of Lane county numbered 3,077, with approximately 1,200 persons eligible for jury duty. At the *voir dire* examination, out of forty-three prospective jurors examined, nine were excused because of preconceived opinions and one was excused because he had served as a juror in Barker's case. Nine others were excused for various reasons until twenty-four jurors were duly qualified and passed for cause by both sides. Each side thereupon exercised six peremptory challenges. The record fails to disclose any undue difficulty was encountered in obtaining a qualified jury. Each member of the jury finally selected was thoroughly examined. The trial court was abundantly cautious and promptly excused any prospective juror who gave any indication that he had formed a fixed and abiding opinion in the case.

This case is not one where the community was exposed to newspaper, radio or TV coverage prior to or during trial, nor is there a showing that the case was even mentioned in the local press or the broadcasting media in the area. To attempt to analogize these facts with those in *Sheppard* v. *Maxwell*, supra, and *Estes* v. *Texas*, supra, is unthinkable. (See, *State* v. *Eldridge*, supra.)

Defendant challenged the array of jurors on the basis that women were not included on the panel. As an explanation of their absence, the county clerk testified that since the names of women could not be placed on the jury lists without their consent, township trustees were probably reluctant to ask them to serve. The trial court, in overruling the challenge, observed that there had been women jurors on prior panels and that there had been neither a systematic nor intentional exclusion of women from the jury lists. The ruling of the court must stand,

even assuming women were excluded from this particular panel. Neither our state nor federal constitution guarantees the right to trial by jury consisting of both men and women. The defendant, not being a member of the excluded class, is in no position to complain about the absence of women from the panel, there being no showing he has actually been prejudiced thereby. (*State* v. *Neff*, 169 Kan. 116, 218 P.2d 248, cert. denied 340 U.S. 866, 95 L.Ed. 632, 71 S.Ct. 90; *State* v. *Snyder*, 126 Kan. 582, 270 Pac. 590; *Fay* v. *New York*, 332 U.S. 261, 91 L.Ed. 2043, 67 S.Ct. 1613.)

As part of his "totality of circumstances" argument defendant also claims he was prejudiced by certain events occurring during the examination of three prospective jurors. A brief narration of the proceedings will show the argument is patently unfounded. After excusing John West because he had served as a juror in the Barker case, the trial judge commented, "The same evidence basically would be used in this case." Upon objection by defense counsel, the judge amended his statement to "similar circumstances and facts would be involved and the same complaining witness." Albert Ehmke, during his examination, expressed some reservation about a defendant who failed to testify. After defendant's challenge for cause, the judge asked the juror if he could follow an instruction to the effect that whether or not the defendant took the stand was not to be considered. Ehmke responded that he would, and the challenge was overruled. Defense counsel pursued the matter further, and Ehmke remained steadfast in his denial that failure of the defendant to take the stand would not be a factor in his decision. When Jerel Barnett was examined there was some indication on his part that the fact the defendant was charged was an indication of guilt and that he would expect the defense to introduce evidence to prove the defendant's innocence. Defendant's subsequent chal-

lenge for cause was overruled. The court observed that counsel's questions were unclear, and promptly corrected any misconceptions of the law as expressed by the juror. Barnett assured the court that he would follow an instruction to the effect that defendant was presumed innocent until proved guilty beyond a reasonable doubt. We find nothing in these events, and particularly the remarks and comments of the trial judge, that would indicate bias or prejudice against the defendant, nor can it be said that the remaining jurors were prejudiced by what took place in their presence.

Only Ehmke and Barnett were unsuccessfully challenged for cause by the defendant. In both instances, after the challenges were denied, defense counsel pursued his line of questioning and eventually passed each juror for cause. Barnett was subsequently removed with a peremptory challenge—by which side is not shown in the record. At any rate he did not sit as a juror. On the other hand, Ehmke was not challenged peremptorily and was permitted to remain. Why defendant chose not to exercise one of his peremptory challenges against Ehmke, we are not told. No contention is made that had he used one of his challenges on Ehmke, he would have been forced to accept some other juror objectionable to him whom he had challenged peremptorily. Presumably, defendant used his peremptory challenges, with the possible exception of Barnett, on prospective jurors against whom he voiced no objection during his extensive *voir dire* examination. Under all the circumstances, he is in no position to complain about the trial court's rulings on his challenges for cause against Ehmke or Barnett. (*State* v. *Hoy*, 199 Kan. 340, 430 P.2d 275; *State* v. *Springer*, 172 Kan. 239, 239 P.2d 944; *State* v. *Hooper*, supra; *State* v. *Tucker*, 137 Kan. 84, 19 P.2d 436.)

During the *voir dire* examination it developed that the wife of one of the prospective jurors, Floyd Fuller, was a first cousin of the wife of C. W. Monroe, the complaining witness. Defendant now claims his conviction is vitiated because Fuller was related to the injured party and thus was an incompetent juror. (K.S.A. 62-1406.) The point requires no discussion on its merits, for the simple reason that the juror was never challenged for cause. Notwithstanding the relationship was discovered early in the examination, no objection was made until defendant's motion for new trial. Ordinarily, a question touching upon a juror's qualifications, if not raised until after the verdict is rendered, comes too late and is not available for the purpose of the defendant's obtaining a new trial. (*State* v. *Wainwright*, 190 Kan. 619, 376 P.2d 829; *State* v. *McCombs*, 163 Kan. 225, 181 P.2d 473.) K.S.A. 62-1410 requires that all challenges for cause be made before the jury is sworn, except where the cause for challenge is not discovered until after the jury is sworn and before the introduction of evidence. When a party, knowing at the time of impanelling the jury that a juror is incompetent, fails to challenge for cause, he waives any right to make complaint upon that ground thereafter. (*State* v. *Hilbish*, 126 Kan. 282, 267 Pac. 1109; *State* v. *Jackson*, 27 Kan. 581.)

Defendant also complains of certain events occurring during the course of the trial which he describes as follows: "The state followed a course of conduct clearly calculated to prejudice the jury against defendant by demonstration of the unsavory character of his associates [Woodard and Ulmer]."

When testifying, Woodard volunteered the information he had gone to the penitentiary shortly after the present Monroe transaction. Woodard was then queried by the state whether his first contract with Mr. Monroe was

"a legitimate termite contract." Defendant's objection to the word "legitimate" was overruled by the court. This question came after Mr. Monroe had testified about his contract with Woodard in 1960 and that he had been satisfied with the terms and the treatment he had received under the earlier contract. Further, Mr. Monroe, Ulmer and Woodard had testified about events leading up to and including the treatment of Monroe's house in 1962. The implication that this second contract was not "legitimate" may not have been too far wrong. At least we cannot say it was prejudicial. Objections to subsequent questions relating to the termination of Woodard's license as a termite exterminator and his relationship with the defendant after the Monroe transaction were sustained by the trial court. Any question about the propriety of such interrogation was cured when the line of questioning was withdrawn and the court admonished the jury "to completely disregard anything that may have been said or implied about any dealings that went on subsequent to the dealings with Mr. Monroe." On the direct examination of Ulmer, the state elicited testimony that he had previously been in the penitentiary on a check charge and was presently in the custody of the sheriff of Lane county. Defendant, failing to object to this testimony, is precluded from now raising the matter for the first time on appeal. (K.S.A. 60-404; *State* v. *Patterson,* 200 Kan. 176, 434 P.2d 808; *State* v. *Donahue,* 197 Kan. 317, 416 P.2d 287; *State v. Freeman,* 195 Kan. 561, 408 P.2d 612, cert. denied 384 U.S. 1025, 16 L.Ed.2d 1030, 86 S.Ct. 1981.)

The defendant also complains he was prejudiced by a comment of the trial judge made at the conclusion of the testimony of Dr. Hart, an expert witness for the defense. While the court's comment was injudicious in nature, it was

not prejudicial. Furthermore, the defendant failed to register any objection at the time.

After the trial, defense counsel apparently discovered that an aunt of the juror Ehmke had been a victim in a similar transaction in November 1963. The matter was brought to the attention of the trial court as a ground in defendant's motion for new trial. The state produced an affidavit of the juror that he did not learn of his aunt's experience until after the present trial. There was no connection between the two transactions; none of the same parties was involved. Clearly, this formed no basis for the granting of a new trial.

In light of our discussion of the various trial errors, we must conclude that the defendant has failed to demonstrate he did not receive a fair trial by an impartial jury. The case was vigorously tried by both sides before an experienced trial judge whom the record discloses exercised great care and patience to insure a trial free from prejudicial error. The burden is always upon the defendant to make it affirmatively appear that his substantial rights have been prejudicially affected. That burden has not been sustained in this appeal.

We now turn to defendant's second basic contention, namely, the evidence is insufficient to support the verdict. This matter was presented to the trial court at the conclusion of the state's evidence, again at the conclusion of all the evidence, and finally, in defendant's motion for new trial. It is conceded that the jury was properly instructed concerning the elements of the offense with which defendant was charged in accord with what was stated in *State* v. *Handke*, 185 Kan. 38, 340 P.2d 877. Among other things, the jury was told that it must find beyond a reasonable doubt the defendant falsely represented there was wood rot

in the floor joists of Monroe's residence and the house had been permanently treated for wood rot, and further, that the defendant knew these representations were not in fact true. At the outset defendant acknowledges the receipt of money from Mr. Monroe by means of the check made payable to Ulmer. Likewise, he concedes that he is bound by any statements of Barker and Woodard made in his presence to Monroe. (*State* v. *McCormick,* 57 Kan. 440, 46 Pac. 777.) Defendant's complaint of insufficient evidence is confined to three disputed issues which he claims were not proved by the state: (1) the absence of wood rot in the floor joists, (2) the house was not permanently treated, and (3) that even if the assumption is made that the representations concerning the presence of wood rot and the permanent treatment of the house were false, defendant had no knowledge of their falsity.

The role of this court in considering the sufficiency of evidence to support a verdict was clearly stated in the recent case of *State* v. *Helm,* 200 Kan. 147, 434 P.2d 796, where we said:

> "In a criminal prosecution it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before a verdict of a jury which has been approved by the trial court may be set aside on appeal on the ground of insufficiency of evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the trial court. (*State* v. *Walker,* 198 Kan. 14, 422 P.2d 565, Syl. ¶1; *State* v. *Shaw,* 195 Kan. 677, 408 P.2d 650; *State* v. *Gregory,* 191 Kan. 687, 383 P.2d 965; and *State* v. *Ledbetter,* 183 Kan. 302, 327 P.2d 1039.)
>
> "When considering the sufficiency of circumstantial evidence to sustain a conviction of crime on appeal, the question is not whether the evidence is incompati-

ble with any reasonable hypothesis except guilt. That question was for the jury and the trial court. The function of the appellate court is limited to ascertaining whether there was a basis in the evidence for a reasonable inference of guilt. (*State* v. *Crosby,* 182 Kan. 677, 324 P.2d 197, 76 A.L.R.2d 514, and authorities cited therein at p. 685 of the official report; and *State* v. *Scoggins,* 199 Kan. 108, 427 P.2d 603.)" (p. 151.)

Was there sufficient evidence to show the absence of wood rot in the floor joists of the Monroe residence? The state produced testimony by two expert witnesses, Mr. Edmund F. Martinez, district entomologist for the Kansas State Board of Agriculture, and Mr. Dean Garwood, director of the division of entomology for said board. Martinez inspected the house in July 1964 and again in October of that year. Garwood was present and took part in the October inspection. Both witnesses testified they found no evidence of any wood rot underneath any portion of the Monroe residence. They further testified that had there been wood rot in the joists in December 1962 (the date of this offense), evidence of such condition would have been present at the time of their inspection nearly two years later. Contrary to defendant's argument, the fact that Martinez also observed that a two-by-four section of a floor plate appeared to have been replaced at sometime cannot be regarded as being inconsistent with his prior testimony. When or why the section was replaced was not shown. The defense offered some evidence through Philip Marvin, an expert witness, tending to show that he had found wood rot in an inactive stage at the time of his inspection in January 1967. But we cannot weigh the evidence; that was the jury's province.

Was the evidence sufficient to show the house was not permanently treated? It was clearly established that a

proper treatment for wood rot is a spray solution consisting of five per cent pentachlorophenol mixed in diesel fuel. After the solution is sprayed on wood the pentachlorophenol leaves crystalline deposits on the surface of the wood which reflect light. As described by Garwood, "It would look as though there were particles of glass on the wood when you shine a light on them; these would reflect the light and you could see them." These characteristics remain present on the surface of treated wood for up to five years or more after application. Both Garwood and Martinez testified their visual inspections did not reveal any crystalline formations which would, in their opinion, denote that the house had in fact been treated with pentachlorophenol. Chemical analyses made of shavings taken from the joists of the house also did not reveal the presence of the chemical. The defense introduced evidence tending to cast some doubt on the reliability of the method used by the state chemist in testing the shavings. Mr. Marvin testified his inspection in 1967 disclosed areas of a "white bloom" substance which could have been "penta" residue. Again, the weight and credit to be given this testimony was for the jury.

Was there evidence that defendant had knowledge of the falsity of the representations concerning the presence of wood rot and the treatment applied? Defendant argues he was not under the house, so he had no knowledge of what was there, and likewise, there was no evidence he knew what the treatment was. As a general proposition, knowledge of the falsity of the representations is required to sustain a conviction of obtaining money by false pretenses; but this requirement is not confined to actual knowledge in the true sense. The following discussion is found in Perkins on Criminal Law (1957) at page 262:

> "The original English statute included the words 'designedly and knowingly.' They were omitted from

> the later legislation in that country; and statutes in some of the states include them while others do not. There seems to be no difference in the result, however, because there is a requirement of 'knowledge' under either type of enactment. The word 'knowledge' is unfortunate in this connection because the actual requirement of the law is not limited to knowledge in the true sense. If the representation is really untrue this part of the requirement is satisfied if it is made by one who *knows* it is untrue, or believes it is untrue, or is quite aware that he has not the slightest notion whether it is true or not."

In *Bank* v. *Hart*, 82 Kan. 398, 108 Pac. 818, this court stated:

> "False representations are actionable when made fraudulently—that is, to induce another to part with his money or property—if believed and acted upon and made with knowledge of their falsity, or when made for such purpose by one who has no knowledge upon the subject but who intends to convey, and does convey, the impression that he does have actual knowledge that they are true, and thereby deceives the other to his injury...." (p. 400.)

Also, see, *State* v. *Lintner*, 141 Kan. 505, 41 P.2d 1036.

As we have pointed out, the defendant is bound by the representations of Barker as well as those made by himself and Woodard. There was ample evidence from which it could be inferred that even if defendant lacked actual knowledge of the accuracy of the representations, his intention was to convey the impression they were in fact true and could be believed and acted on by Mr. Monroe. Without going into detail, we also believe there was sufficient direct and circumstantial evidence to show a conspiracy between the defendant and his accomplices who had actual knowledge of the falsity of the representations, thus charging the defendant with the knowledge of his co-

conspirators. (See, *State* v. *Borserine*, 184 Kan. 405, 337 P.2d 697.)

We must conclude that the verdict of the jury is supported by substantial competent evidence proving each of the elements of the offense charged, and the conviction is sustained.

The state has cross-appealed on a reserved question. Before sentencing, records were introduced showing the defendant had been convicted by a general court-martial in Berlin, Germany, on May 6, 1949, of robbery and felonious assault, and was sentenced to a dishonorable discharge, total forfeitures, and confinement at hard labor for a period of three years. The trial court refused to recognize the conviction for the purpose of sentencing the defendant as a second offender under the habitual criminal statute (K.S.A. 21-107a). We have given this matter thorough consideration and are not impressed with the cases cited from a limited number of jurisdictions which apparently recognize such convictions for the purpose of imposing an enhanced sentence. Our statute applies when there are former felony convictions committed "in or out of this state." We have held that the statute does not require the foreign conviction to be a felony under the laws of this state; it is sufficient that the offense was a felony as defined by the law of such other state or jurisdiction. (*Tyrell* v. *State*, 199 Kan. 142, 427 P.2d 500; *State* v. *Stiff*, 148 Kan. 224, 80 P.2d 1089, rehearing 148 Kan. 457, 83 P.2d 424.) Courts-martial convictions frequently relate to offenses of a strictly military character which have no counterpart in the civil law, such as desertion, willful disobedience of a lawful order of a superior officer, and misbehavior before the enemy. We cannot imagine the legislature contemplated that K.S.A. 21-107a was to be applied to a person previously convicted of an offense peculiar only

to the military establishment. On the other hand, were we to say that only those military convictions were to be recognized which would be felonies as defined by the Kansas law, we would, in effect, be adding a requirement to the statute that any foreign conviction be a felony under our law. This we cannot do. We hold that a prior conviction by court-martial may not be used to invoke the provisions of the habitual criminal statute.

The judgment is affirmed both as to the appeal and cross-appeal.

No. 45,071

STATE OF KANSAS,
Appellee and Cross-Appellant,

v.

ELMER G. PAXTON,
Appellant and Cross-Appellee.

Supplemental Opinion

SYLLABUS BY THE COURT

Certain factual statements appearing in the original opinion in *State* v. *Paxton*, 201 Kan. 353, ... P.2d ....., filed May 11, 1968, are deleted and corrected.

Appeal from Lane district court; BERT J. VANCE, judge. Supplemental opinion filed June 19, 1968. Affirmed.

Raymond L. Spring, of Topeka, argued the cause, and *Dale H. Corley*, *Lelyn J. Braun* and *Patrick J. Regan*, of Garden City, and *Richard D. Greene*, of Denver, Colorado, were with him on the brief for the appellant and cross-appellee.

Daniel D. Metz, assistant attorney general, argued the cause, and *Robert C. Londerholm,* attorney general, and *John S. Elting,* county attorney, were with him on the brief for the appellee and cross-appellant.

The opinion of the court was delivered by

O'CONNOR, J.: The defendant (appellant) has filed a motion for rehearing on the decision affirming his conviction (*State* v. *Paxton,* 201 Kan. 353, ... P.2d .....). After careful consideration we find the motion should be and it is hereby denied.

Our attention, however, has been directed to certain matters in the second paragraph of page 361 of the opinion which should be corrected and clarified. Accordingly, the paragraph is deleted and in its stead the following is substituted:

After the trial, defense counsel apparently discovered that an aunt of the juror Ehmke had been a victim in a similar transaction in November 1963. The matter was brought to the attention of the trial court as a ground in defendant's motion for new trial in which he alleged the juror "probably" had knowledge of the previous transaction. There is nothing in the record indicating such knowledge on the part of the juror. Moreover, there is no showing that the defendant was connected with the prior transaction in any way. Clearly, this formed no basis for the granting of a new trial.

In all other respects we adhere to what was said and held in the original opinion.

APPENDIX C

For the convenience of the court, copies of the record as printed below being unavailable, certain pertinent portions of the record are set forth herein rather than being set forth at length in the statement of the case.

LEO BROWN

Called as a witness in behalf of the defendant, being first duly sworn, testifies as follows:

Direct Examination by Mr. Braun

Q. Would you state your name and address, please? A. Leo Brown, Dighton, Kansas.

Q. And what official capacity do you hold with the county government? A. County Clerk.

Q. How long have you held this position? A. Twelve years.

Q. How long have you resided in Lane County, Kansas, Mr. Brown? A. All my life.

Q. As County Clerk, Mr. Brown, you are in charge of selection of jurors in cases in the District Court of Lane County, Kansas, are you not? A. Well—

Q. Or at least you participate in the selection? A. I participate.

Q. Are you also as County Clerk familiar with the population of Lane County, Kansas? A. Yes.

Q. Would you state what the population of Lane County, Kansas, is? A. Is now?

Q. Yes. A. It's not complete yet but it will be nearly the same as last year.

Q. And in numbers what would that be? A. The figures right now as they stand, 3077. I think we will add some to that.

Q. Of that number how many constitute eligible jurors to serve in cases of the District Court of Lane County, Kansas? A. I have done a little checking; I would say right at 40%.

Q. So you would have approximately 1200 people who would be eligible for jury duty. Of that number of eligible jurors how many are of the female sex? A. Well now, that part of it, it would be hard. You would have to check through the books. I haven't checked.

Q. In your prospective juror lists from which jurors are selected there are women included? A. No, there isn't any in the lists.

Q. Stated another way, are there any names of any women in the jury box from which prospective jurors' names are selected? A. No.

Q. Why is that? A. I think it's more habit than anything else. The township trustees and the mayor are the ones that select the names to be drawn from; they just never have listed women. They are required to be asked if they want to serve and I think they just never have.

Q. As far as you know there are no eligible female jurors? A. Not at the present.

Q. On this jury list that was drawn on April 4, 1967, that would be true in that instance? A. Yes.

THE COURT: Mr. Braun, do I understand you are going to raise the point whether there are female jurors in this box?

MR. BRAUN: Your Honor, I may have misled the Court; I would like for the purpose of this petition for change of venue to raise two questions. Number one, the absence of any females on the list of prospective jurors and, number two, the other reason for this was to confine my arguments or to tie into my argument here on the mat-

ter of knowledge generally in the community of prospective jurors.

THE COURT: That's not what I am asking you. I am asking you are you challenging the array?

MR. BRAUN: Yes, Your Honor.

THE COURT: It's a little late to challenge the array, isn't it?

(Thereupon, argument is had by Mr. Braun off the record.)

THE COURT: Let's find out why there were no women jurors in this county.

A. There has been nothing definite ever decided that they wouldn't do any such thing, but the township trustees, I suppose, have been reluctant to ask women to serve. They figure that they have to be asked and if they refuse they can't be listed anyway. I suppose that's been the thinking on it; I don't know. I suppose we could have insisted they list what women they could. It's just something that's, like I say, it has been kind of a habit, I suppose.

THE COURT: Do you have any authority, Mr. Braun, that shows that women have to be included?

MR. BRAUN: No, I don't, Your Honor, at this time. I'm not sure the statute says it must be. I believe it refers to those only which are exempted from jury duty.

MR. BROWN: Can I say anything further?

THE COURT: Yes.

MR. BROWN: The statute there sets out, like what I was saying a minute ago, that women need to be asked before they can be placed on the jury list. I take it from that if they refused they can't be listed anyhow.

The defendant appears in person and by Mr. Lelyn J. Braun, of Corley, Braun & Regan, 114 West Pine Street, Garden City, Kansas.

THE COURT: Let the record show that this is Case No. 309, the State of Kansas v. Elmer G. Paxton. The

State appears by John S. Elting, County Attorney, and Daniel D. Metz. The defendant appears in person and by Lelyn J. Braun.

I took under advisement the challenge made by the defendant to the array. The basis of the challenge was that there was no women jurors selected. I have studied the matter carefully and I have gone over the prior jury lists in this county and I find that in prior years and on prior juries we have had women jurors and I have come to the conclusion that there has been no systematic intentional elimination of women jurors; that the situation that there are no women on the panel arises from our peculiar Kansas statutes to make a woman exempt unless she indicates to a personal property tax assessor that she wishes to serve, and because of the recent change in personal property tax assessment there is very little, if any, opportunity for personal property tax assessors to talk to any of the women who might be eligible. I think that is the reason that there are no women on the jury panel and, in addition, from the nature of this case, there is no particular reason why women should or should not be on the panel. In other words, this does not involve a case in which women jurors would be required because of any peculiarity of their viewpoint. For that reason I am going to overrule the challenge to the array. (R. pp. 5-7)

The following transpired in examination of jurors on voir dire:

JOHN WEST

Examination by Mr. Elting

A. I think I seen them here about four years ago. I was a juror on that Monroe trial. How many years ago was that? I seen those men.

Q. You were a juror in the State v. Barker case? A. Yeah, of Charley Monroe.

THE COURT: Under those circumstances, if there's no objection, I believe you will be excused.

MR. ELTING: No objection.

THE COURT: The same evidence basically would be used in this case.

MR. BRAUN: I would like to object to that, your Honor, at this time, this statement by the court and I don't know whether we can cure that now, but, Your Honor, we the same. It might prejudice my client.
can't be telling this jury the evidence is going to be exactly (sic).

THE COURT: I recognize that, Mr. Braun; if I said the same evidence, I am perhaps mistaken, but similar circumstances and facts would be involved and the same complaining witness, so I think that it's only fair that you not sit as a juror and I am going to excuse you. If you are needed later in the term you will be notified.

Call another juror.

CLERK: Albert Ehmke.

(Thereupon, Albert Ehmke is sworn to answer questions.) (R. 11)

ALBERT EHMKE

(Passed for cause by Mr. Elting.)

Examination by Mr. Braun

Q. If it should develop Mr. Paxton does not take the stand to testify in this case, would that fact tend to prejudice you towards the defendant on the basis on which you are going to resolve this evidence? A. It might make a difference.

Q. And why would that be true? A. I suppose because I'm human. I think the evidence would have to show at least why he didn't take the stand.

Q. Well, maybe I misled you. The mere fact a person does not choose to testify, you feel that would tend to create some doubt in your mind whether or not he's guilty or innocent? A. This has always been a sore point with me, yes.

Q. In other words, if you heard about people who choose not to testify from the news media or wherever you heard about it, you always felt the lack of testimony indicated his guilt? A. I can't see why an innocent man can't say so.

Q. In spite of the fact we have a constitutional privilege not to be a witness against ourself? A. I realize that.

Q. You feel if you were to serve on this jury that would tend to leave some reservation in your mind? A. I'm afraid it might.

MR. BRAUN: We challenge this man for cause.

THE COURT: Mr. Ehmke, if I instruct you that the law is that the State of Kansas has to prove this man guilty beyond a reasonable doubt, he doesn't have to prove he's innocent at all, and that whether he chooses to take the stand or not is something you should not consider; in other words, he's got no obligation to take the stand at all, you should not consider whether he takes the stand, could you follow that instruction? A. I would do my best.

THE COURT: Can you follow it? Would you follow it? A. Yes.

THE COURT: I will overrule the challenge.

Q. (By Mr. Braun) Now, Mr. Ehmke, so I understand your answer, you realize what you told the Judge, don't you? A. I've got a pretty fair idea.

Q. Let me state it another way. You just told Judge Vance that if he instructs you that way, that's the law; that's not only the law of this trial, that's the law of the land, and you will have to be bound by it. A. Okay.

Q. That's a tremendous responsibility. In spite of what you have just told is your own personal feeling, will you then follow the law even though you may not agree with it. A. I have followed laws I haven't agreed with, yes.

Q. So I understand this, because I can appreciate your opinion, but I also appreciate what is at stake here now, you appreciate and you fully understand the tremendous responsibility that's thrust upon you as a prospective juror, do you not? A. Yes.

Q. You are going to be taking an oath that you will fairly try this case? A. Yes.

Q. If the Court so instructs you, you will have no reluctance even though you may not agree with it, you will bring in a verdict, if this man may choose not to testify in his own behalf? A. I don't know if I followed all that.

Q. Well, let me see whether I can state it some other way. You expressed sort of an opinion that you felt that a man ought to tell his own story and you understood that the law says he doesn't have to? A. I realize that.

Q. But in your own mind you have some doubt as to whether or not this person could be innocent if he chose not to testify; did I understand that correctly? A. That's right.

Q. Stated another way, you would feel maybe he was guilty if he didn't testify? A. No, I don't necessarily think it means he's guilty, but I can't understand why he wouldn't want to testify if innocent.

Q. Let me ask you a further question. If it should develope during the testimony that another witnesses called for the State of Kansas filled in the facts you thought should be coming forth from this defendant, you wouldn't hold that against Mr. Paxton if he chose not to testify? A. No.

Q. You and I know another fellow can tell the story as well as I can? A. Yeah.

Q. So he may have a personal reason for not wanting to testify; maybe he's got a nervous twitch and won't make a good impression on the jury; you would be satisfied that this is not going to prejudice you against this man? A. That's correct.

(Passed for cause by Mr. Braun.) (R. 11-13)

WARREN BRUNER

(Passed for cause by Mr. Elting.)

Examination by Mr. Braun

Q. How long have you and Paul Marsteller been neighbors? A. Twenty years.

Q. Has Paul told you a little bit about the facts of this case? A. Yes, we have talked.

Q. I suppose Paul gave you a pretty good rundown on what he thought the results should be? A. Yeah.

MR. BRAUN: I am going to challenge Mr. Bruner for cause.

THE COURT: The challenge will be sustained. You will be excused until we call you later some time in the term. (R. 13)

JEREL BARNETT

(Passed for cause by Mr. Elting.)

Examination by Mr. Braun

Q. When you sort of have that feeling, that because somebody is charged they have probably got some pretty satisfying evidence and probably means he's guilty, are you going to expect me to put in some evidence that he ain't? A. I think so.

Q. You think I ought to. Now that means after the State's case is rested you are going to expect me to come

in with evidence to show certain things here and different from what the State says they are and you are going to need this to satisfy your own mind before you are going to find this man not guilty? A. I don't quite follow you.

Q. I want to be perfectly fair; I believe before you said you believe in the constitutional presumption of innocence. A. Yes.

Q. I want to be sure you and I understand each other. Mr. Paxton stands charged with supposedly obtaining money under false pretenses from a man in this community. Now, the mere fact he's charged with that crime indicates to you that there might be a question about his guilt, doesn't it? A. Yes.

Q. So I understand your answer, even though you don't think he's guilty per se, there is a presumption or a question in your mind about the fact that because he stands charged here that he might be guilty. Stated another way, you are going to expect me to put in a little evidence to prove to your satisfaction that any figment of suspicion concerning my client has been removed before you would find him not guilty, is that right? A. Yes.

MR. BRAUN: I will challenge this man for cause.

THE COURT: Overruled. You haven't gotten near the question. The mere fact that a man is charged with a crime, somebody can think he might be guilty because he's charged, that's true. I don't understand that this juror said that he wouldn't require the State to prove the case beyond a reasonable doubt and would not presume the man was innocent.

If the Court instructs you that this man is presumed to be innocent until he's proven guilty beyond a reasonable doubt, you would follow that instruction, wouldn't you?

A. Yes.

THE COURT: Overruled.

Q. (By Mr. Braun) I want to ask you once more because I need to be sure in my own mind, irrespective of what the Court's instructions might be, is it my understanding from your answers that it's going to require me immediately to come forward and put in evidence to disprove the guilt of innocence? A. No, sir.

THE COURT: Just a moment, Mr. Braun, that's not a proper question. If the State proves its case, then you've got to put in evidence. If the State doesn't prove its case, of course you don't. You are leaving that element out in the question. That's where the confusion is arising.

MR. BRAUN: Would the Court like to phrase the question? Maybe I'm working on it too hard.

THE COURT: The way you are putting the question to the juror you are saying that your man should be presumed to be innocent after the State's evidence is in. If the State's evidence showed him to be guilty, he wouldn't have that presumption. That's where your confusion is arising.

MR. BRAUN: I beg the Court's pardon, and yours too, Mr. Barnett.

Q. Now let me ask you in this way. Standing alone, with nobody putting any evidence in, at this time do you feel that I have a duty or Mr. Paxton has a duty because he stands charged with the crime to put in something now or even before the State put in its case to your satisfaction that he had to come forth and satisfy your own mind that he's absolutely not guilty of any charge? A. If he's charged with it? What do you mean.

Q. The mere fact he stands charged now. A. If he ain't got nothing to prove, there wouldn't be

MR. BRAUN: I'll pass for cause. (R. 14-16)

SAM PORTER

Examination by Mr. Elting

Q. Would the fact that you worked with Charley at the depot influence your consideration of this case either one way or the other? A. I don't believe.

Q. Have you heard anything about this case? A. Just like I stated while ago, I heard rumors. I don't like to see people swindled out of anything.

Q. You think you could be guided solely by the evidence you hear from the witness stand and guided as to the law according to the instructions of the Court in his instructions. A. Yes.

(Passed for Cause by Mr. Elting.)

Examination by Mr. Braun

Q. You answered the question about the rumors that you say you didn't hear any facts about this case, you heard some rumors, but that you didn't like it when a guy gets swindled out of his money; who were you referring to? A. Anybody that gets swindled.

Q. Did you hear somebody say Charley got swindled? In all fairness don't you think you have expressed an opinion without any foundation in fact? A. I just stated a rumor.

Q. Do you believe that's what happened? A. I don't know enough to believe anything.

Q. You are saying Charley Monroe never mentioned a word to you? A. No.

Q. What is your opinion of people generally in pest control work? A. I haven't had them do anything for me so I haven't formed an opinion.

(Passed for cause by Mr. Braum.) (R. 23)

During the presentation of the State's case, the following occurred during direct examination of state's witness R. V. WOODARD.

Q. Was your first contract with Mr. Monroe a legitimate termite contract?

MR. BRAUN: I will object to the form of the question, Your Honor, as to the wording "legitimate". It implies something here, serves no purpose other than again to bootleg in by virtue of something they can't establish in the evidence. It's highly prejudicial. There's no evidence there's anything illegitimate.

MR. METZ: We have had clear testimony as to what type of operation was being carried out over this period of time.

THE COURT: I will overrule the objection. You may answer the question.

A. Well, as far as I know, it was legitimate because I was licensed by the State and bonded by a bonding company, so evidently it was legitimate.

Q. What were the circumstances that brought about your—let me ask first of all—

THE COURT: Mr. Metz, you are going to have to stand closer.

Q. Was your contract terminated by the State of Kansas, not your contract, your license, to do business as a termite exterminator?

MR. BRAUN: I will object again to the form of the question. It's irrelevant and immaterial unless it has some connection with the charges pending against my client. The only thing he's trying to do is establish something that serves no purpose other than prejudice the jury.

THE COURT: What is the purpose of this line of testimony?

MR. METZ: The purpose, Your Honor, is to fill in on the relationship and the events that have transpired in connection with the operation in which the defendant played a principal part or was the principal.

MR. BRAUN: Your Honor, it implies a crime that is not connected in any way, shape or form to establish anything, serves no purpose other than to prejudice this guy right here.

THE COURT: I will sustain the objection.

Q. Mr. Woodard, what is generally the percentage of pentachlorophenol that is used in a treatment? A. Usually 5%.

Q. Can you describe any of the characteristics of penta? A. Well, only just through book knowledge. I am no chemist. I go strictly according to state and U.S. Department of Agriculture recommendation. A 5% solution of pentachlorophenol will get rid of beetles and it will also correct wood rot when properly applied.

Q. What outward characteristics are noticeable in a solution of that percentage; what outward characteristics are there? A. Penta, if you spray a board and it's in the dark, and shine a light on it, it's a mass of little crystals on the wood.

Q. What, if any, odor does this solution have? A. It has quite a severe odor.

Q. Getting back to Dighton and Mr. Monroe's house, what did you do after receiving the money and making the division as you described a few minutes ago? A. We left and went home for the week.

Q. How long did your relationship with Mr. Paxton then continue from that point? A. Oh, I believe as well as I remember, about three weeks.

Q. What were the circumstances that brought about the termination of this?

MR. BRAUN: Again I will object to the form of the question. It's completely irrelevant and immaterial what their relationships were subsequent to anything they might have done at Dighton, Kansas.

THE COURT: Sustained.

MR. METZ: Could I put in a word of argument here? I believe we can present any continuing dealings of this nature which show the same type of operation that transpired in Dighton involving Mr. Monroe. That was the sole purpose for my question.

MR. BRAUN: Your Honor, at this time I respectfully move the Court to declare a mistrial in this case. The State of Kansas had done everything it can to imply in front of this jury circumstances which are irrelevant and immaterial and so far out from the charges contained in the information that the only purpose they could serve is completely prejudice this defendant.

THE COURT: Overruled. Will counsel approach the bench?

(Thereupon, the following proceedings are had at the bench outside the hearing of the jury.)

MR. METZ: I will withdraw this line of questioning if it will make it—

THE COURT: You are going to withdraw it?

MR. METZ: Yes.

THE COURT: I will admonish the jury then.

(Thereupon, the following proceedings are had in the hearing of the jury.)

THE COURT: Gentlemen of the jury, this question has been withdrawn and I am instructing you to completely disregard anything that may have been said or implied about any dealings that went on subsequent to the dealings with Mr. Monroe. Just put that out of your mind and forget it. It doesn't have anything to do with this matter. Forget that completely and completely disregard any suggestions even made about such dealings.

You may proceed. (R. 43-45)

At the conclusion of direct examination of MR. DAVID MARION HART, a defense witness and expert in chemistry, the following occurred:

(MR. ELTING:) Your Honor, I didn't hardly hear a word the witness said. I wonder if we could wait for cross-examination until tomorrow to give us a chance to get that testimony to be transcribed.

(THE COURT:) Frankly, John, there's no more chance Lil could read these scientific terms than you and I could understand them, and also, we are running into a tight time schedule. I believe we better get the evidence in this evening. (R. 92)

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 3 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 385

ELMER G. PAXTON,
Petitioner,

vs.

THE STATE OF KANSAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT C. LONDERHOLM
Attorney General of Kansas
Statehouse,
Topeka, Kansas
Attorney for Respondent

EDWARD G. COLLISTER, JR.
Assistant Attorney General
JOHN ELTING
Lane County Attorney
Of Counsel

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106; HArrison 1-3030

INDEX

Statutes Involved 1

Statement of Facts 2

Argument—

I. Appellant Received a Fair Trial 7

A. Prejudicial Publicity, Knowledge of the Case, and Pervasive Community Sentiment 7

B. Comments of the Trial Judge 11

C. Miscellaneous Claims Concerning Witnesses and Jurors 12

II. The Manner in Which the Jury Panel Was Drawn Did Not Violate Due Process 14

III. There Was Sufficient Evidence upon Which the Jury Could Base Its Verdict 15

Conclusion 16

Table of Cases

Bass v. *Mississippi*, 381 F.2d 692 (5th Cir. 1967) 14

Beck v. *Washington*, 369 U.S. 541 (1962) 9, 10

Estes v. *Texas*, 381 U.S. 532 (1965) 8, 10, 11

Fay v. *New York*, 332 U.S. 261 (1947) 14

Hoyt v. *Florida*, 368 U.S. 57 (1961) 14

Irvin v. *Dowd*, 366 U.S. 717 (1961) 8, 9, 13

Rideau v. *Louisiana*, 373 U.S. 723 (1963) 8

Sheppard v. *Maxwell*, 384 U.S. 333 (1966) 8, 10, 11

State v. *Paxton*, 201 Kan. 353, 440 P.2d 650 (1968) 12, 15

State v. *Paxton*, 201 Kan. 607, ... P.2d ..... (1968) (Supplemental Opinion) 13

Strauder v. *West Virginia*, 100 U.S. 303 (1880) 14

Turner v. *Louisiana*, 379 U.S. 466 (1965) 8

White v. *Crook*, 251 F. Supp. 401 (D.C. M.D. Ala. 1966) 14

Statutes

K.S.A. 43-116 ..... 1, 14

K.S.A. 62-1318 ..... 2, 7

K.S.A. 62-1321 ..... 2, 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 385

ELMER G. PAXTON,
Petitioner,

vs.

THE STATE OF KANSAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The opinion of the Supreme Court of Kansas overruling defendant-petitioner's appeal, and affirming the judgment of conviction is reported at 201 Kan. 353, 440 P.2d 650, Supplemental Opinion, 201 Kan. 607, ... P.2d .....(1968), and appears in the record commencing at pages 143 and 154.

STATUTES INVOLVED

K.S.A. 43-116. Exemption from jury service. The following persons shall be exempt from serving as jurors, to wit: All persons holding office under the laws of the United States or this state, attorneys and counselors at law, women, physicians, all registered pharmacists and

assistant pharmacists, ministers of the gospel, professors and teachers of colleges and other institutions of learning, ferrymen, all members of any company of firemen organized according to law, officers and attendants of the state industrial reformatory, and all persons more than sixty-five years of age: *Provided, however,* That this act shall not exempt from jury service township officers and officers of district schools.

K.S.A. 62-1318. Removal to another county in same district when inhabitants prejudiced against defendant. Any criminal cause pending in any district court may be removed by the order of such court, or the judge thereof, to the district court of another county in the same district, whenever it shall appear, in the manner hereinafter provided, that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair trial cannot be had therein.

K.S.A. 62-1321. Same; contents of petition; affidavits; notice; rebuttal. In the petition for a change of venue the applicant shall set forth the facts upon which the application is made, and the truth of the allegations in the petition shall be made to appear, by affidavits, to the satisfaction of the court. Notice of such application must be given to the county attorney, who may resist such application by counter affidavits.

STATEMENT OF FACTS

Prior to the late fall of 1962, Mr. R. V. Woodard, of Anthony, Kansas, operated a termite exterminating business. (R. 72, 119-120) Mr. Woodard was acquainted with petitioner Paxton prior to the fall of 1962. (R. 120) Sometime shortly before December, 1962, petitioner and a man named Richard Ulmer traveled to Woodard's home in

Anthony, Kansas, to make some kind of arrangement whereby Paxton, and Woodard could revisit some of Woodard's old customers to renew or "rehash" the old contracts. (R. 30, 37) (Rehashing means to go back to old customers and try and get some kind of additional or different job. Woodard testified that the rehash jobs are sought from elderly persons. (R. 39)

For his participation in the deal, Ulmer was to receive 20% of the proceeds. (R. 30, 37) Paxton and Woodard were to split the remainder. (R. 37, 42) Although Ulmer worked for Paxton, and Paxton was the head of the operation (R. 30, 32, 33, 35, 42), Ulmer received a relatively large proportionate share of the proceeds because he was the check man, or the man who was to cash the checks received from the customers, and it was felt he would be the one exposed to danger of prosecution. (R. 41) If he got into trouble the others were to assist him in securing legal services, etc. (R. 32, 34)

During early December, 1962, Paxton, Woodard, Ulmer and several others traveled through the State of Kansas visiting old customers. (R. 31-32, 37-38) Upon their arrival in Dighton, Kansas, about December 12, they proceeded to the home of Mr. C. W. Monroe, one of Woodard's old termite customers. (R. 26, 38) Woodard, himself did not know that Monroe was a former customer. (R. 47) Paxton knew Monroe was a former *Woodard* customer and that Monroe was elderly. (R. 47)

On December 12, Woodard, Paxton, Ulmer and a fourth man named Barker drove to Monroe's home. (R. 40) Paxton jumped on the floor in the home and indicated that the floor was weak or needed bracing. (R. 27, 40) Later, the men asked if they could inspect underneath the home, and upon receiving permission, Barker

went under the house and came back with a piece of wood which he indicated had wood rot on it. (R. 27) Monroe was told that his house could be permanently protected from wood rot and termites by the application of certain chemicals and/or processes. (R. 27) He was told a contract covering the perpetual maintenance would be furnished, but he never received any contract. (R. 117)

Shortly thereafter, a material was sprayed underneath the home. (R. 115) Paxton and Ulmer then returned to collect for the job. (R. 118) Paxton carried on the conversation on this occasion, and *gave instructions* as to the manner in which Monroe would pay for the job. (R. 116, 118) Monroe was told to make his check for $1156.00 payable to Ulmer (R. 116), who had been identified to Mr. Monroe as the chemical man (R. 116) although Ulmer had no experience with chemicals. (R. 119) Monroe was then told to call his bank and tell them that Ulmer would come in with the check and to instruct the bank to cash the check immediately. (R. 118) All of this he did. (R. 116-117) Ulmer cashed the check and received 20% of the proceeds. (R. 116) The remainder went to Paxton, his employer. Paxton paid the other employees and split the remainder with Woodard. (R. 42)

Edmond Martinez, the District Entomologist for the Kansas State Board of Agriculture inspected Monroe's home in July, 1964. (R. 52, 120, 122-125) Monroe told Martinez about the 1962 application and identified Paxton from pictures as the man who had jumped up and down on the floor. (R. 123)

Martinez inspected the house and found *no evidence of wood rot.* (R. 53, 54, 127) He found termite evidence

only in a piece of loose wood, or trash, on the cellar floor. (R. 53) He found no structural damage. (R. 61, 124) Martinez testified that if there had been prior damage through wood rot or termites it would have been evident since the destroyed wood would have been in the same condition it was when the affliction was arrested. (R. 124) He also testified that if pentachlorophenal (penta) had been used in the treatment of this home, there would have been a crystalline material on the wood surface and there would have been a distinctive odor remaining in 1964. (R. 124-125) He found no evidence of presence of penta. (R. 124) (Paxton and his associates had represented that they would use penta in the treatment of the home on December 12, 1962. Monroe thought he was paying for an application of that chemical. (R. 28-29)) Martinez returned to Monroe's home in October, 1964, with Dean Garwood, his superior in the Entomology Division of the Kansas State Department of Agriculture. At that later time, the two men were accompanied by a carpenter from Dighton, who took random shavings from the wood supports and flooring in the basement. (R. 55)

The wood shavings were taken by Garwood to Loren Delp, a chemist for the State Board of Agriculture. (R. 66) Garwood also testified that he found no indication of wood rot or insect damage in Monroe's basement (R. 65), and agreed if there had been damage, it would have remained and been visible after the basement had been sprayed. (R. 65) He found no evidence that penta had been used in 1962 (R. 65), although evidence of an actual treatment should have existed in 1964. (R. 65)

Loren Delp, head of the pesticide analytical section of the Board of Agriculture Laboratory, received the wood shavings from Garwood, and conducted a spectrophotome-

try test to determine whether penta was present. (R. 70-76) This recognized scientific process (R. 70) revealed, in Delp's opinion, that penta was not present in the wood shavings received from the Monroe home. (R. 74)

Phillip Marvin, Petitioner's entomologist, found some evidence of termite and wood rot in *debris found on the floor* of Monroe's basement in 1967. (R. 82, 130-131) He also testified he found three minute spots on the wood members of the structure in the basement where penta *could have* been present (R. 83), but conducted no tests. (R. 131)

David Hart, a chemist at Oklahoma City University, testified that the tests run by Loren Delp were not necessarily conclusive, and that additional tests could have been run to further determine if penta had been present in the wood shavings taken from the Monroe home. (R. 90, 91)

The trial court overruled a challenge to the array. "The basis of the challenge was that there were no women jurors selected., I have studied the matter carefully and I have gone over the prior jury lists in this county and I find that in prior years and on prior juries we have had women jurors and I have come to the conclusion that there has been no systematic intentional elimination of women jurors; . . . ." (R. 7)

ARGUMENT

I.

Appellant Received a Fair Trial.

A. Prejudicial Publicity, Knowledge of the Case, and Pervasive Community Sentiment.

By doing an excellent job of editorializing counsel for petitioner has constructed "pervasive community sentiment" running against the petitioner. The claim is made that petitioner could not receive a fair trial in Lane County, Kansas. The record simply does not support any such conclusion and as a matter of fact negates the claim.

Kansas provides a pre-trial method for securing a change of venue in the event a criminal defendant would not be likely to receive a fair trial in the county where the information is filed. K.S.A. 62-1318-1321. A request for change of venue must show prejudice by allegations of fact, as opposed to conclusions of counsel, supported by affidavits. K.S.A. 62-1321. If the type of "pervasive community sentiment" running against petitioner actually existed it would seem elementary that petitioner's counsel would have been able to present *affidavits* establishing as a matter of *fact* that such was true. However, no attempt was even made to introduce such facts. Petitioner's trial counsel, Mr. Leland Braun, did offer his personal affidavit that he had talked with one of the jurors on a previous case and that juror had indicated that there might be community sentiment against petitioner. (R. 3-5) It was the only evidence offered to support the allegation of community wide prejudice. The trial court rejected the affidavit as being hearsay. (R.

112) There is no indication in the record that any attempt was made to secure affidavits *from anyone in the community* to support the claim that community wide prejudice existed. Even during the trial, no further attempt was made by counsel for petitioner to demonstrate community wide prejudice.

The record is startlingly devoid of any proof of *any* prejudicial pre-trial publicity. *Compare, Sheppard* v. *Maxwell*, 384 U.S. 333, 337-342 (1966). There was no evidence of prejudicial publicity during the trial. *Compare, Sheppard, supra*, at 342-349. There was no evidence of radio or television coverage, either live, by video tape, or editorially, concerning petitioner's case. *Compare, Estes* v. *Texas*, 381 U.S. 532, 536-538 (1965); *Rideau* v. *Louisiana*, 373 U.S. 723, 724 (1963). There was no evidence of an *excited populace*, or a *mob oriented community*, or of a community wide pattern of deep and wide prejudice. *Compare, Irvin* v. *Dowd*, 366 U.S. 717, 725-728, 729 (1961). There was no evidence that during the trial any improper outside influences of any kind were presented to the jury. *Compare, Turner* v. *Louisiana*, 379 U.S. 466, 467-469 (1965).

The essence of petitioner's argument is that the interrogation of prospective jurors established proof of pervasive community sentiment. Of course, any of the evidence revealed during interrogation of the jurors occurred after the motion for a change of venue had been presented, without support, and overruled. But, even had the voir dire testimony been included in affidavits supporting a motion for change of venue, it would not have revealed that petitioner could not receive a fair trial in Lane County. Forty-three jurors were called for the voir dire examination. The twenty-four jurors constitut-

ing the final panel were passed for cause.[1] (R. 10, 13, 14, 16, 18, 19, 23, 25, 26)

Two of those twenty-four jurors indicated that they had heard rumors, but apparently counsel for petitioner was so unconcerned about the prospective effect of this knowledge that he did not challenge them for cause. (R. 17, 19, 23) These same jurors testified under oath that they could follow the instructions of the Court and would be guided by the evidence. (R. 17, 23) Further, these two jurors did not serve on the jury. (R. 102)

The trial court was abundantly cautious and indeed prompt in excusing jurors who gave any indication that they might have formed an opinion in the case. No such jurors served. However, even had jurors served who had formed an opinion, petitioner would not necessarily be deprived of a fair trial.

> "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin* v. *Dowd,* 366 U.S. 717, 723. See also, *Beck* v. *Washington,* 369 U.S. 541, 557 (1962).

Of the remaining nineteen jurors excused, eleven were excused for reasons not related to knowledge of this case. (R. 10, 11, 13, 14, 18, 21, 22, 26) One juror indicated he could not be fair to either side for an unspecified reason. (R. 20) One juror said he knew the sheriff personally

1. Two of the jurors, Ehmke and Barnett, had originally been challenged for cause, but apparently later that challenge was withdrawn. The challenge was not based on the fact that these jurors might have had some knowledge about the case. (R. 11, 13, 15-16)

and had discussed the case with the sheriff. (R. 13) Six jurors indicated they had heard something about the case and had formed an opinion. There was no indication either during voir dire or subsequently, of the nature of the knowledge held by these jurors.

Lane County has a small populace. Prospective jurors are likely to include in their numbers, *inter alia*, persons directly related to witnesses or participating parties, or persons who are personally friendly with county or state officials. It is even likely that in any particular criminal case some of the populace has heard rumors or stories concerning the case. However, in this instance the record is absolutely clear that counsel for both parties and the court strove to insure that the jury panel of twenty-four finally selected had *heard nothing* causing them to form an opinion on the case, thus exhibiting even more caution than strictly required. *Beck, supra*, at 557-558.

Ultimately, petitioner requests this Court to conclude that it is impossible *per se* for a criminal defendant to receive a fair trial in any lightly populated county. It is conceded that in a small county, as well as any other, a prospective defendant *may* not be able to receive a fair trial because of publicity or community wide bias and prejudice under certain demonstrated circumstances. However, unless the facts reveal *exceptional circumstances* present in such cases as *Sheppard* v. *Maxwell, supra*, or *Estes* v. *Texas, supra*, a showing of identifiable prejudice to the accused is required.

> "It is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrative reality." *Beck* v. *Washington, supra*, at 558.

It is obvious when comparing *Sheppard* and *Estes* to this case that such exceptional circumstances are not present here. The atmosphere in which the appellant's trial took place was one of total calm. There was no demonstration of any sort of pre-trial or trial publicity in newspaper, radio or television. It strains the imagination to think that this trial on an unspectacular charge of obtaining money under false pretenses is a *cause celebre*.

There is absolute failure in this case to demonstrate and identify any prejudice depriving petitioner of a fair trial.

B. Comments of the Trial Judge.

Petitioner points to three instances during the trial where comments made by the trial judge allegedly deprived him of a fair trial. During the examination of juror West, it was revealed that he was a juror on a "Monroe" trial about four years ago. The trial judge commented that the same evidence basically would be used in this case. After defense counsel objected to the remark but did not move for mistrial, the Court indicated that if he had said that the same evidence would be used he was *mistaken* "but similar circumstances and facts would be involved [with] the same complaining witness, ..." (R. 11) This comment did not indicate the cases were the same, even if it could be assumed the jurors knew anything at all about the *Barker* case which had been tried three years earlier. The significance of *State* v. *Barker* was supplied by petitioner's trial counsel. (R. 25, 28)

Petitioner complains of a remark made by the trial judge during the examination of juror Barnett concerning the effect of the presumption of innocence. Taken in the context in which it was made, it is not even clear

that trial court statement was incorrect. (R. 15-16) In any event, there is no question that the jury was properly instructed on the issue of burden of proof and presumption of innocence. See *State* v. *Paxton*, 201 Kan. 353, 361 (1968).

Petitioner complains of a comment made by the trial judge at the conclusion of the testimony of one of petitioner's expert witnesses. The expert witness, a chemist, testified concerning procedures of analyzing chemical properties of substances. The abstract reveals his testimony was in some part framed in scientific language. The occasion for his cross-examination came late in the day and counsel for the state had requested that the cross-examination be delayed until the next morning. The judge noted that there wasn't much chance the court reporter could read the "scientific terms," or that the judge or county attorney could understand "them." Following this colloquy counsel for the state noted that even though he would have difficulty trying to cross-examine the witness he would try, not because "what [he] said wasn't clear, but because I'm not an analytical chemist." (R. 92) The comments did not concern the witnesses' credibility or reliability.

C. Miscellaneous claims concerning witnesses and jurors

Petitioner claims prejudice because the fact that two of the state's witnesses, who were petitioner's associates, had served sentences in the penitentiary was revealed during the trial. It was clearly noted that the sentences were unreleated to this case. (R. 29, 46) No objection was made to the questioning of witness Ulmer (R. 29), or the voluntary statement of witness Woodard. (R. 45) Had the state not questioned Ulmer in this regard, petitioner's very able trial counsel might well have impeached Ulmer's credibility by the same line of questioning.

Petitioner impugns the manner in which juror Ehmke was questioned by the trial judge. The trial judge asked the juror if the latter *could* and *would* follow the instruction relating to testimonial privilege of a defendant. (R. 12) The question was proper to establish the fitness of a juror to serve. *Irvin* v. *Dowd, supra,* at 723. It would be impossible to determine if jurors would abide courts' instructions if the judge were unable to ask such questions.

Juror Ehmke later, in response to questions from petitioner's counsel, testified that he realized the great responsibility of jury service. (R. 12) He was passed for cause by petitioner's counsel. (R. 13)

Petitioner condemns the action of the Kansas Supreme Court in considering an affidavit of juror Ehmke which it is asserted was not part of the trial record. The Kansas Supreme Court didn't base any portion of its decision on this affidavit. *State* v. *Paxton,* 201 Kan. 607, 607, ... P.2d ..... (1968). (R. 155)

Petitioner had alleged that Ehmke's aunt was the victim of a similar transaction prior to this trial.

There was (1) no evidence that juror Ehmke knew about this transaction (R. 109) (the basis of the rejection of this claim by the Kansas Supreme Court), and (2) no evidence that petitioner was in any way involved in the prior transaction. Juror Ehmke had apparently testified on voir dire that to his knowledge none of his relatives had used the services of a pest control operator. (R. 104)

There is no indication in the record that petitioner ever attempted unsuccessfully to show knowledge of such a transaction on the part of juror Ehmke.

Considering petitioner's indictments of his trial individually or collectively, he was not denied a fair trial.

The individual claims are fallacious, and the "totality of circumstances" does not present any substance of denial of a fair trial.

II

The Manner in Which the Jury Panel Was Drawn Did Not Violate Due Process.

Petitioner objects to the fact that no women were included in the jury panel. Petitioner has no standing to raise this objection.

> "This Court, however, has never entertained a defendant's objection to exclusions to the jury except when he was a member of the excluded class." *Fay* v. *New York*, 332 U.S. 261, 287 (1947).

This pronouncement has not been overruled.

The Kansas statute does not absolutely prohibit the inclusion of women on juries. See K.S.A. 43-116. Consequently, the authority relied upon by petitioner in support of his claim is inapplicable. See *Bass* v. *Mississippi*, 381 F.2d 692, 696 (5th Cir. 1967); *White* v. *Crook*, 251 F. Supp. 401, 403, 408 (D.C. M.D. Ala. 1966). The jury discrimination doctrine based on equal protection of the laws (*Strauder* v. *West Virginia*, 100 U.S. 303, 310 (1880)) therefore does not apply.

Neither is the claim of systematic exclusion of a particular class from the jury (See *Hoyt* v. *Florida*, 368 U.S. 57, 69 (1961)) applicable. The trial court found that there was no systematic exclusion of women from Lane County juries. (R. 7) The record demonstrates no purposeful discrimination, no long course of discriminatory practice, or no deliberate design evidencing discriminatory motives to exclude women from Lane County juries. See *Hoyt*, *supra*, at 68-69.

III

There Was Sufficient Evidence upon Which the Jury Could Base Its Verdict.

Petitioner claims denial of due process because there was no evidence upon which the jury's verdict might be based.

Both the trial court and the *appellate court on review determined that there was sufficient evidence for a reasonable inference of guilt.* *State* v. *Paxton, supra,* at 361-365. Petitioner claims there was no proof of actual knowledge on his part of the representation made to Monroe and fraud involved. As a matter of *state law,* the Kansas Supreme Court found the knowledge required for conviction for obtaining money under false pretenses is not confined to "actual knowledge in the true sense." *State* v. *Paxton, supra,* at 363. In Kansas, knowledge is present, if the

> "representation [that is made] is really untrue . . . [and] is made by one who knows it is untrue, or believes it is untrue, or is quite aware that he has not the slightest notion whether it is true or not." *State* v. *Paxton, supra,* at 364.

There was ample evidence from which it would be inferred, if not directly concluded, that petitioner's intention was to convey the impression that the facts related to Mr. Monroe concerning the existence of wood rot and the necessity of spraying were actually true and should be acted upon by Mr. Monroe. (R. 26, 27, 30, 33, 114-115, 117) There was sufficient direct evidence as well as circumstantial evidence by the testimony of two state's witnesses that they could find no presence of wood rot or termites in the floor structure, substructure, or supports underneath Monroe's house. (R. 53, 54, 65, 127)

There was evidence that if wood rot or termite infestation had been present in 1962, evidence of it would have remained on the occasion of the visual inspection in 1964. (R. 65, 124) There was also substantial evidence that had Monroe's cellar been treated with penta, as represented by petitioner and his associates, evidence of it would have remained, and would have been discoverable by visual observation, smell, and chemical analysis. (R. 65, 124-125) The state's evidence was that there was no evidence of the existence of penta. (R. 65, 74, 124) Assuming that petitioner's evidence was in conflict with the evidence submitted by the state, a jury question remained.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied

Respectfully submitted,

ROBERT C. LONDERHOLM
Attorney General of Kansas
Statehouse,
Topeka, Kansas
Attorney for Respondent

EDWARD G. COLLISTER, JR.
Assistant Attorney General
JOHN ELTING
Lane County Attorney
Of Counsel